(FEDERAL MARITIME COMMISSION)
(SERVED JANUARY 4, 1994)
(EXCEPTIONS DUE 1-26-94)
(REPLIES TO EXCEPTIONS DUE 2-17-94)

FEDERAL MARITIME COMMISSION

DOCKET NO. 1757(F)

ELINEL CORPORATION

v.

SEA-LAND SERVICE, INC.

Elinel Corporation, the consignee of a shipment of ceramic tiles from the Dominican Republic to Miami, Florida, filed an informal complaint, alleging that respondent, Sea-Land Service, Inc., overcharged it on the shipment by rating the shipment under a different rate than Sea-Land's agent had advised Elinel before the shipment. Sea-Land had sued Elinel in federal District Court in Miami and obtained a judgment against Elinel for $8,755.18, the same amount of damages which Elinel is now seeking before the Commission, plus incidental losses. In its last pleading, Elinel claims that Sea-Land violated section 18(a) of the Shipping Act, 1916, and that Sea-Land's rate was unreasonable. When Sea-Land did not consent to the informal procedure, the case was transferred to the formal procedure. It is held:

(1) The same claims and defenses that Elinel is now asserting before the Commission were heard, considered, and decided by the District Court, which found that Sea-Land was assessing the correct tariff rate and rejected Elinel's defenses based on equities. The complaint is therefore barred by the doctrine of res judicata, and it is accordingly dismissed.

(2) The District Court suggested that Elinel could file a complaint with the Commission challenging the reasonableness of the charged tariff rate. However, the Commission

has no reasonable rate authority under the Shipping Act of 1984, unlike the 1916 Act.

(3) Even if not barred by res judicata, under the filed-rate doctrine, Elinel is required to pay the applicable tariff rate notwithstanding claims of misquotation, reliance on another quoted rate, or side agreements.

Peter S. Herrick for complainant.
Claudia E. Stone for respondent.

INITIAL DECISION[1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

The instant complaint, which was filed with the Commission, was served on respondent on October 22, 1993. It is an offshoot of a case that was heard and decided by the United States District Court Southern District of Florida, Shelby Highsmith, District Judge. In the Court case, a case in admiralty, Sea-Land sued for $8,755.18 in unpaid freight in connection with a shipment of ceramic tiles which it had carried for the consignee, Elinel Corporation, in November 1991, from Rio Haina, Dominican Republic, to Miami, Florida. On May 10, 1993, the Court granted Sea-Land's motion for summary judgment. On June 21, 1993, the Court issued its Summary Final Judgment, finalizing its earlier order, and on August 4, 1993, the Court denied Elinel's motion to set aside the May 10 order and the June 21 judgment. Apparently because of a suggestion in the Court's opinion that Elinel could raise the matter of the reasonableness of Sea-Land's rates before the Commission in a separate case, Elinel decided to file the instant complaint. (See informal complaint, para. H, and May 10, 1993 Court opinion at 9 n. 5.)

[1]This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 318, Rules of Practice and Procedure, 46 CFR 502.318).

In its informal complaint, Elinel advises that it has been sued and has suffered judgment against it for the amount of unpaid freight and alleges that it "has been damaged to the extent of an adverse judgment of $8,755.18 because the (sic) overcharges in claiming the wrong tariff rate or filing the wrong tariff rate; for attorney's fees; for costs; and, for loss of business in shipping tiles from the Dominican Republic to Miami, Florida." (Complaint at para. VI.) Elinel alleges furthermore that it had acted on the advice and rate quotation of Sea-Land's agent in the Dominican Republic, Mr. Patrick Herman, who had quoted a rate of $542 per 20-foot container under one tariff item (No. 76135) but that later Sea-Land rebilled Elinel under another tariff item (No. 76700) at approximately four times the originally quoted rate. In its answer to the informal complaint, Sea-Land denies any wrongdoing and contends that upon audit of its freight bills, Sea-Land recomputed the freight due under what Sea-Land believed to be the correct tariff rate. More significantly, in its answer, Sea-Land contends that the Court has already ruled upon the matters in dispute and agreed with Sea-Land that tariff Item 76700 was the proper rate to apply under the tariff, as Sea-Land had contended before the Court. Therefore, Sea-Land refused to consent to a decision by the Settlement Officer under the Commission's informal, small-claims procedure (Subpart S, 46 CFR 502.301-502.305), and asserted that Elinel's claim is barred under the doctrine of res judicata or collateral estoppel and by the "filed rate" doctrine as enunciated by the United States Supreme Court. As provided by 46 CFR 502.311 of the Commission's rules, the case was referred to the Office of Administrative Law Judges and was assigned to the undersigned judge on December 15, 1993, for adjudication under the procedures set forth in Subpart T--Formal Procedure for

Adjudication of Small Claims, 46 CFR 502.311-502.321. However, while the case was still before the Settlement Officer under Subpart S, Elinel responded to his inquiries by letter dated December 6, 1993. By letter dated December 10, 1993, Sea-Land objects to consideration of Elinel's letter as not being authorized under the Subpart T procedure.

As provided by 46 CFR 502.313, under the formal Subpart T procedure, Elinel has filed its reply to Sea-Land's answer to the complaint with attached materials. (See Elinel Corporation's Reply and Memorandum, served December 23, 1993, with attached documents.) In its reply, Elinel contends that Sea-Land violated "46 U.S.C. sec. 817" (sic) when it demanded $8,755.18 in freight in addition to the sum it had already collected from Elinel. Elinel repeats its allegations made in its informal complaint that Sea-Land's agent, Mr. Patrick Herman, had told Elinel how to describe the shipped ceramic tiles and advised Elinel that a rate of only $542.00 per 20-foot container would be charged (rather than $2,030 per 20-foot container under which rate Sea-Land rebilled Elinel). Elinel also challenges Mr. Herman's credibility although Mr. Herman, in his affidavit filed by Sea-Land, had not directly contradicted Elinel's charges as to the facts. Elinel also challenges the credibility of Sea-Land's witness O'Hara because she testified in her affidavit that Elinel had not paid the freight bill, although Sea-Land had obtained a writ of garnishment and a Court order requiring Elinel's bank to pay Sea-Land's counsel the $8,755.18 found by the Court to be due to Sea-Land.

In its final reply, Elinel also states that Mr. Herman "induced Elinel, to its detriment, to ship its four (4) containers with Sea-Land." (Elinel's Reply at 2.) Elinel states furthermore that it disputed Sea-Land's supplemental freight bill, which increased Elinel's

ocean freight charges by almost three times the original freight bill, and asserts that this additional freight bill turned Elinel's profit into a loss on the sale of the ceramic tiles, furnishing an affidavit of Mr. Nelson Garcia, Elinel's President, to support this last statement. Furthermore, Elinel claims that had it known that it would be charged the much higher rate of $2,030 per 20-foot container, it might not have purchased the tiles or it would have increased its own pricing to compensate.

In its reply, Elinel argues that Sea-Land has "collected a greater compensation for such transportation of Elinel's merchandise than the rates, fares, and charges filed in compliance with section 817" (sic), and that Sea-Land has caused Elinel to incur out-of-pocket costs in excess of $6,500. (*Id.* at 3.) Elinel states furthermore that Settlement Officer Farrell had "correctly analyzed the overcharging by Sea-Land in this case" and quotes the text of "section 817" regarding the Commission's authority to prescribe "a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation or practice." (*Id.*) Elinel concludes by requesting that the Commission "make a finding that Sea-Land's collected compensation in this case was unjust and unreasonable; that Elinel is entitled to reparations from Sea-Land; and that these reparations include Elinel's out-of-pocket losses." (*Id.* at 4.)[2]

[2]In view of the clarifications contained in Elinel's final reply, the information contained in Elinel's December 6 letter to Settlement Officer Farrell loses significance. The letter, to which Sea-Land objects, was written in response to the Settlement Officer's inquiries, which were authorized under 46 CFR 502.304(a). Both the letter and Sea-Land's objections to it were dated during the time the case was before the Settlement Officer. In any event, Elinel's December 6 letter has no evidentiary value and at best could be used only to clarify the informal complaint, which had mentioned the word "overcharges" but had not referred to any Shipping Act. Even if considered for that limited purpose only, however, the letter is less than helpful. Thus, in the letter, Elinel seems to be saying that it is not challenging the reasonableness of the assessed rate but rather Sea-Land's alleged practice in quoting a lower rate to Elinel before the shipment. However, the letter also claims that Sea-Land charged more freight than its filed rates authorized. The letter has now been superseded by Elinel's final reply, which now appears to focus on the Commission's authority to determine a just and reasonable maximum rate or practice as well as the alleged "overcharging."

The Doctrines of Res Judicata and Collateral Estoppel

Both the doctrines of res judicata and collateral estoppel, which Sea-Land has invoked as affirmative defenses, act to preclude litigation of matters that have already been decided or that would have been decided had a party brought the matter to the attention of the first court to hear the case. In modern decisions res judicata has been increasingly referred to as "claim preclusion" while collateral estoppel has been referred to as "issue preclusion." The primary difference between the two doctrines is that a party is precluded from raising any claim or defense in a second action that should have been raised in the first action under claim preclusion whereas the party is not precluded from litigating a claim or defense that was never litigated in the first action and did not have to be raised in the first action under issue preclusion. Thus "the general rule of claim preclusion is that a valid and final judgment on a claim precludes a second action on that claim or any part of it." The general rule of issue preclusion, on the other hand, is that "if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Wright, *The Law of Federal Courts* (4th ed., West Publishing Co.), sec. 100A at 680, 682.

The Supreme Court has defined the two doctrines on numerous occasions. In one case, *Montana v. United States,* 440 U.S. 147, 153-154 (1979), the Court stated as follows:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata is that a "right, question or fact distinctly put in issue and directly determined by a court of competent

> jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ." (Case citation omitted.) Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. (Case citations omitted.) Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. (Case citations omitted.) Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. (Case citations omitted.) To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. (Footnote citation omitted.)

The Court has described the doctrines and their purposes in similar language in *Nevada v. United States,* 463 U.S. 110, 128-130 (1983); *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 398-99 (1981), *Allen v. McCurry,* 449 U.S. 90, 94 (1980); *Brown v. Felsen,* 442 U.S. 127, 131 (1979); and *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 (1979). To illustrate the Court's holding that the doctrines are designed to ensure judicial finality and to preclude repetitive litigation, the Court has held that a party is precluded from relitigating the same claim even if the first court deciding the matter was wrong or was later reversed as to other claimants. In such a situation the Court held that the claimant should have sought reversal from the appropriate court of appeals, failing which the claimant is precluded from relitigating the same matter. The case was *Federated Department Stores, Inc. v. Moitie,* cited above, 452 U.S. at 398. The Court stated that "the indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments." (*Id.*) See also *In Re Justice Oaks II, Ltd.,* 898 F.2d 1544, 1552 n. 8 (11th Cir.) cert. denied, 111 S. Ct. 387 (1990).

Another authority describes the doctrines of res judicata and collateral estoppel and their purposes as follows (1B Moore's *Federal Practice,* para. 0.405 [1], page III-12):

> The doctrine of res judicata is not a technical rule, but a rule of fundamental repose for both society and litigants. (Footnote omitted.) Its salutary principle is "founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court." (Footnote omitted.) The doctrine prevents an encore and "reflects the refusal of law to tolerate needless litigation." (Footnote omitted.) And subsequent litigation is needless if, by fair process, a party over whom the court had jurisdiction raised or had an opportunity to raise issues that were a part of the cause of action previously dealt with.

This same authority continues as follows (*Id.* at para. 0.405 [3], page III-15):

> A final, valid determination on the merits is conclusive on the parties and those in privity with them, as to matters that were litigated or should have been litigated in another action or proceeding involving the same cause of action. Thus a judgment for either plaintiff A or defendant B on A's claim, rendered after a trial on the merits of the claim, is a final judicial settlement thereof, regardless of whether A has put forward all the grounds of recovery available to him in connection with his claim and of whether B has interposed all defenses open to him, (footnote omitted) and even though the parties may have lacked knowledge of their complete legal rights at the time. (Footnote omitted.) A valid final judgment is, of course, open to direct attack by a proper motion to vacate the judgment in the court that rendered it, and it may be reversed or set aside on appeal. . . . But in the absence of these attacks, a valid judgment on the merits operates as a conclusive adjudication in another proceeding, in which it is properly pleaded or proved (footnote omitted) when this proceeding involves the same claim or cause of action and is between the same parties or their privies. (Footnote omitted.)

As the Supreme Court has succinctly put it in *Commissioner v. Sunnen,* 333 U.S. 591, 598 (1948):

> Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel.

When the first court has decided all the issues that are necessary to resolve the dispute between the same parties, the distinction between res judicata and collateral estoppel becomes academic. As Professor Moore states (1B Moore's, cited above, at page III-20):

> Although distinct in operation, both doctrines of res judicata and collateral estoppel have a common objective--judicial finality. (Footnote omitted.) When the issues actually litigated and determined as necessary to the outcome of the litigation are such that they will be dispositive of particular subsequent litigation, the distinction between res judicata and collateral estoppel is, between the parties to the first suit, merely theoretical. (Footnote omitted.)

To determine if the instant complaint is barred by the doctrine of res judicata (claim preclusion), it is necessary to determine whether Elinel is pursuing the same "claim" or "cause of action" as that involved in the court case in Miami. See *Nevada v. United States,* cited above, 463 U.S. at 130-131. As the Court observed, definitions of what constitutes the same cause of action for purposes of applying res judicata have not remained static over the years. (*Id.*, at note 12.) Thus, such definitions have evolved from the view that the causes of action were the same if the same evidence would be needed to sustain both actions to the view that both actions must involve the violation of one legal right by one legal wrong to the modern view espoused by the Restatement (Second) of Judgments, namely, that the causes of action are the same if they arise from the same transaction or series of connected transactions. See also the annotation in *Res Judicata--Identical Claims,* 82 ALR Fed 829-887. According to the annotation (82 ALJ Fed at 837), the "clear trend in the most

recent decisions . . . has been towards the adoption of section 24 of the Restatement 2d, of Judgments, which sets forth a 'transactional analysis' as to what constitutes a 'claim' . . . ." At the time of the annotation cited (1987), seven of the thirteen federal Circuit Courts of Appeals, as well as the Claims Court, had expressly adopted the Restatement's transactional approach. (*Id.*) The Restatement's transactional approach has also been expressly adopted in the same court in which Sea-Land's claim against Elinel has been heard and determined, namely, the United States District Court for the Southern District of Florida. See *John Alden Life Insurance Co. v. Cavendes,* 591 F.Supp. 362, 367-368 (S.D. Fla. 1984) ("The modern test for determining whether causes of action are the same for purposes of res judicata is the 'transactional' approach adopted by the Restatement (Second) Judgments 1981 secs. 24, 25.").[3] Furthermore, if the same claim or series of connected transactions are involved in the instant complaint as those that were involved before the District Court in Miami in Sea-Land's original suit there, Elinel would be precluded from raising new defenses before the Commission, which it could have raised before the Court. See *Brown v. Felsen,* cited above, 442 U.S. at 131 ("res judicata prevents litigation of all grounds for,

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[3] Restatement (Second), Judgments, sec. 24, states as follows:

> Dimension of "Claim" for Purposes of Merger or Bar-General Rule Concerning "Splitting" (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. (2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

See also *Manning v. City of Auburn,* 953 F.2d 1355, 1358-1359 (11th Cir. 1992), in which the Court seems to approve a test involving the primary right and duty and the same "operative nucleus of fact" to determine if the same cause of action was involved in an earlier court determination.

or defenses to, recovery that were previously available to the parties regardless of whether they were asserted or determined in the prior proceeding."); *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 378 (1940), cited by the Court; see also *Lovely v. Laliberte,* 498 F.2d 1261 (1st Cir.) cert. denied 419 U.S. 1038 (1974); *John Alden Life Insurance Co. v. Cavendes,* cited above, 591 F.Supp. at 368.

The Commission has itself invoked the doctrines of res judicata and collateral estoppel and has even declined to exercise its jurisdiction when parties have brought the same dispute before a court of competent jurisdiction where it is pending. See *Ataei v. Barber Blue Sea Line,* 24 SRR 647, 653 (I.D.) F.M.C. notice of finality, January 12, 1988 (complaint dismissed after court had decided essentially the same matters against complainant); *Martyn Merritt--Possible Violations of Shipping Act of 1984,* 25 SRR 1495, 1498-1499 (1991) (Commission disallows relitigation of same issues of fact decided in previous Commission case); *Venemar Line, Inc. v. Crowley Caribbean Transport, Inc.,* 25 SRR 1332 (ALJ) (complaint dismissed after court order affirming settlement); *New Orleans Steamship Association v. Plaquemines Port, etc.,* 23 SRR 1363, 1370-72 (1986) (Commission follows doctrines of res judicata and collateral estoppel but allows partial relitigation concerning possible change of facts affecting Commission's jurisdiction). In other cases the Commission has declined to exercise its jurisdiction when the same matters were pending before competent courts which did not ask for the Commission's assistance under the doctrine of primary jurisdiction. See discussion and cases cited in *Venemar Line, Inc. v. Crowley Caribbean Transport, Inc.,* 25 SRR 1175, 1179 (ALJ 1990).

The parties have furnished their pleadings and the evidentiary materials submitted to the Court in Miami in the original suit brought by Sea-Land before that Court. Examination of these materials shows that the same claims and defenses were involved before the Court except for the claim of unreasonableness of the applicable rate, which decided them adversely to Elinel. Consequently, the distinction between res judicata and collateral estoppel becomes academic only. In the Court case, Sea-Land obtained a judgment against Elinel in the amount of $8,755.18 in unpaid freight charges for the shipment of ceramic tiles, which Sea-Land had carried from Rio Haina, Dominican Republic to Miami, Florida in November 1991. As found by the District Court, Sea-Land carried the ceramic tiles in four containers and originally calculated freight on the basis of a rate of $542.00 per 20-foot container. However, as a result of an audit, Sea-Land recalculated freight under a rate of $2,030.00 per 20-foot container and billed Elinel for an additional $8,755.18. The court noted that there was a dispute as to the correct tariff commodity item which was applicable to the shipment and considered four possible items, an earlier and later Item No. 76703, No. 76135, and No. 76700, the last one claimed by Sea-Land. The Court determined that Sea-Land was correct in applying Item No. 76700 ("Tiles, Floor or Wall, Ceramic") at $2,030.00 per 20-foot container as a matter of law because that item's commodity description "most closely fits the actual shipped goods, 'ceramic tiles'." (Court's May 10 decision at 7.)

In the Court case, Elinel contended that it had relied upon Sea-Land's original determination that the proper rate would be only $542 per 20-foot container (under Item No. 76135), not $2,030.00, as rebilled (under Item No. 76700). (See Elinel's answer and

affirmative defenses in *Sea-Land Service, Inc. v. Elinel Corporation,* Case No. 92-1923, U.S. District Court for the Southern District of Florida.) Elinel further contended that it had relied upon the freight cost and used it to determine its own selling price and that it was Sea-Land, through its agents, who was solely responsible for determining the correct rate because Elinel did not participate in this determination. (*Id.*) Elinel contended that Sea-Land was attempting to charge an inapplicable tariff item and should be "equitably estopped" from seeking to alter its original rating. (*Id.*) However, the Court, citing the "filed rate" doctrine followed in *Maislin Industries, U.S. v. Primary Steel, Inc.,* 110 S. Ct. 2759, 2766 (1990), rejected Elinel's equitable defense. (Court's May 10 decision at 5-6 n. 2.) Furthermore, in rejecting tariff Item No. 76135 ("ceramics, clay articles") and a later Item No. 76703 ("tile and other articles, viz.: block, concrete . . . or wall ceramics"), both rated as $542 per 20-foot container, the Court found that the former item ("articles") was less specific than Item No. 76700 ("tiles") and therefore not applicable under relevant tariff law. As for the later Item No. 76703 ("tile . . . ceramics") which could arguably apply to the shipment, the Court found that that item did not go into effect until mid-to-late 1992, well after the subject shipment, which had occurred in November 1991. (*Id.* at 5-7 and note 3 on page 7.) The Court also considered an earlier tariff Item, also No. 76703, which had been in effect at the time of the shipment in November 1991. This Item was described as "Tile and other articles, viz.: Block, Concrete, Building Hollow Brick, Building, Common Roofing Clay, Concrete or Earthware Floor of Wall Ceramics." The rate was $99.50 W, TL Min 39,000 Lbs. (See U.S. Atlantic & Gulf-Hispaniola Steamship Freight Association, Tariff, FMC No. 13, 5th Revised Page 519, attached as Exhibit D to Affidavit of

Carol O'Hara, dated January 7, 1993, which was submitted to the Court; see also Court decision of May 10, 1993, at 7.) However, after considering all four tariff items which could arguably be applicable to the shipment, the Court found as a matter of law that the proper item to be applied was Item No. 76700 ("Tiles, Floor or Wall, Ceramic") with a rate of $2,030.00 per 20-foot container, as Sea-Land had contended. (Court decision, cited above, at 7 and note 3 on page 7.) The Court stated as follows:

> Therefore, the Court finds, as a matter of law, that the appropriate tariff item for Elinel's cargo is 76700, as applied by Sea-Land in recomputing its charges.

After the Court issued its May 10 decision, Elinel filed a motion asking the Court to set aside its order and decision. (See Motion to Set Aside Order, etc., June 21, 1993.) Elinel argued to the Court that the earlier Item No. 76703 ($99.50 W, TL Min 39,000 Lbs.) had been in effect at the time of the shipment and that it conflicted with Item No. 76700 ($2,030.00 per 20-foot container), which latter rate the Court had found to be applicable, agreeing with Sea-Land. Therefore, Elinel asked the Court to retain jurisdiction and refer this alleged conflict to the Commission under the doctrine of primary jurisdiction. (Apparently Elinel was no longer seeking to have Item No. 76135 ($542 per 20-foot container), on which it had claimed to rely when booking the shipment, apply.) In a short ruling, the Court denied Elinel's motion and a companion motion seeking to set aside the Court's final summary judgment. (See Court's Order, August 4, 1993.) The Court, in denying both motions, stated succinctly:

> Upon due consideration, it is hereby ORDERED AND ADJUDGED that both motions are denied.

It appears therefore and it is so found that the Court resolved the dispute as to which tariff item should apply to the shipment in question, holding that the question was one of law involving a determination of the proper tariff classification, not one requiring reference to the Commission.[4] The next question is what, if anything, did the Court expect the Commission to do when it ruled that Elinel could file a complaint with the Commission challenging the reasonableness of Sea-Land's rate of $2,030 per 20-foot container.

In its May 10 decision, the District Court expressly ruled upon three of Elinel's defenses to Sea-Land's claim for freight due, rejecting two of them. These two were the defenses that Elinel had paid for the service rendered and that Sea-Land was attempting to charge a rate under an inapplicable tariff item. The third defense raised by Elinel was that the rate sought by Sea-Land was unreasonable because it represented a fourfold increase over the originally-quoted and billed rate and was four times the same rate later approved and filed in Sea-Land's conference tariff in 1992 applicable to ceramic tiles. The Court noted that Elinel had failed to raise this defense in its pleadings as a counterclaim or as a defense but raised the issue in Elinel's memorandum opposing Sea-Land's motion for summary judgment. (May 10 decision at 8-9.) The Court found the unreasonable-rate defense to be procedurally defective, but even if properly pleaded, the Court held that it

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[4]The question whether to refer a matter to an administrative agency under the doctrine of primary jurisdiction is one for the discretion of the District Court and will not be overturned on appeal unless that Court abused its discretion. Furthermore, it is recognized that courts need not refer questions to agencies if the questions involve merely tariff construction and not technical questions or other questions requiring the agency to utilize its special knowledge of an industry. See *U.S. v. Western Pacific Railroad Co.*, 352 U.S. 59, 65-66, 69 (1956); *U.S. v. Bessemer & Lake Erie R.R.*, 717 F.2d 593, 599 (D.C. Cir. 1983); see also *U.S. v. Open Bulk Carriers*, 465 F.Supp. 159 (S.D. Ga. 1979) (District Court declines to refer Shipping Act question to the Commission). As the Court in *Open Bulk* indicated, if Elinel believed that the District Court erred in not referring the matter to the Commission, Elinel's recourse was to appeal to the Court of Appeals. (See case cited, 465 F.Supp. at 166.)

would not defer issuing summary judgment for Sea-Land to await a ruling by the Commission, citing *Reiter v. Cooper,* 113 S. Ct. 1213, 1221 (1993). (*Id.* at 7-9.) The Court further observed that a shipper could initiate a separate reparation claim against a carrier challenging the reasonableness of the filed rate but stated that it was expressing no opinion regarding the "viability of a separate reparation action by Elinel challenging the reasonableness of the tariff rate." (*Id.* at 8 n. 4, and 9 n. 5.)

It seems clear that under the doctrine of res judicata applied by the courts, as discussed above, the matter of which tariff item should apply to the subject shipment has been decided, and it is now too late for Elinel to try to present new defenses or new theories as well as its old defenses or theories seeking to upset the Court's determination. As discussed above, if a party fails to present its theories or defenses to the first court hearing a claim, it fails to do so at its peril and is later precluded from asserting new theories, which it should have presented to the first court to hear the dispute. As also discussed above, under several definitions of what constitutes a "claim" or "cause of action" that is later precluded, especially the modern transactional definition, the matter of what tariff item should have been applied to the subject shipment has been decided and Elinel is now precluded from relitigation under any new theory or defense. However, as also discussed above, the Commission has considered issues when a court has instructed parties to file complaints with the Commission while retaining ultimate jurisdiction, and has done so when the court case involved the question of the proper tariff rate that should be applied to a shipment. See, e.g., *In the Matter of Rates Applicable to Ocean Shipments via APL,* 21 SRR 1168 (1982).

The District Court in the instant litigation did not ask for the Commission's assistance in determining the proper tariff rate to be applied. At most, the Court suggested that Elinel could file a complaint with the Commission challenging the reasonableness of the rate of $2,030 per 20-foot container, which the Court found to be applicable under Sea-Land's tariff, but even then the Court expressly gave no opinion on the "viability" of any such complaint. (See Court's May 10 order at 8 n. 4, and 9 note 5.) It is clear from the context of the Court's May 10 opinion that the Court, relying on precedent established under the Interstate Commerce Act (ICA), believed that a shipper being sued for freight by a carrier under a filed rate could raise the defense of rate unreasonableness for the Interstate Commerce Commission to determine. Indeed, the authorities cited by the Court were cases decided under the ICA, namely, *Reiter v. Cooper,* 113 S. Ct. 1213 (1993), and *In Re Penn Central Transp. Co.,* 477 F.2d 841, 845 (3rd Cir. 1973), aff'd sub nom. *U.S. Steel Corp. v. Trustees of Penn Central Transp. Co.,* 414 U.S. 885 (1973). (See May 10 opinion at 5, 8-9.)

Unfortunately for Elinel, this Commission has no jurisdiction to determine the reasonableness of any particular rate in the foreign trades of the United States under the Shipping Act of 1984. Had this case arisen in the Puerto Rican-to United States trade or in any other domestic, offshore, interstate trade (Alaska or Hawaii, primarily) the Court's suggestion would be valid. That is because the Commission administers the Shipping Act, 1916, now 46 U.S.C. app. secs. 801-842, which is confined to domestic, offshore, interstate trades, as well as the Intercoastal Shipping Act, 1933, 46 U.S.C. app. sec. 843-848, which is similarly limited. Under section 18(a) of the former Act, 46 U.S.C. app. sec. 817(a), and section 4 of the latter Act, 46 U.S.C. app. sec. 845a, the Commission is empowered to

determine the reasonableness of any rate filed by ocean carriers in the domestic trades.[5] Before the enactment of the 1984 Act, the Commission had been authorized to disapprove any rate that it found to be "so unreasonably high as to be detrimental to commerce" in the U.S. foreign trades. That authority was contained in section 18(b)(5) of the earlier version of the 1916 Act, formerly 46 U.S.C. sec. 817(b)(5). But even that authority, which was repealed in 1984, was prospective only and did not authorize the Commission to award reparations retroactively. See *Westinghouse Electric Corp. v. Sea-Land Service, Inc.,* 19 SRR 1056 (1979). In any event, the instant case involves a shipment in the foreign commerce of the United States, and there is no authority in the 1984 Act for the Commission to determine the reasonableness of Sea-Land's rate of $2,030 per 20-foot container. Thus, reference to cases decided under the ICA, which, like the 1916 and 1933 Acts, gives reasonable-rate authority, is not determinative of the question of the jurisdiction of this Commission. As regards this particular matter, the District Court stands at a coordinate level with the Commission, i.e., it cannot determine the scope of the Commission's jurisdiction so as to bind the Commission to the Court's determination, even had the Court specifically requested the Commission, under the doctrine of primary jurisdiction, to determine the reasonableness of Sea-Land's $2,030-per-20-foot-container rate. See *Burlington Northern Railroad Co. v. M.C. Terminals, Inc.,* 26 SRR 682, 693 (I.D.) adopted in

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[5]Although in its informal complaint, Elinel did not specify which Shipping Act was allegedly violated, in its final Reply and Memorandum, Elinel alleges that Sea-Land violated "46 U.S.C. sec. 817" and quotes the language of "section 817." These references, however, are to section 18(a) of the Shipping Act, 1916, which does not apply to the foreign trades of the United States. (See Elinel's Reply and Memorandum at 1 and 3.) Furthermore, the 1916 Act is now found in the appendix to Title 46 U.S.C.A. as is the 1984 Act. To support its allegation that Elinel "suffered out-of-pocket loss from unjust and unreasonable charges" and is therefore entitled to reparations, Elinel cited one case, *Williams Clarke Co. v. Sea-Land Service, Inc.*, which can be found at 17 SRR 1429 (1977). (Elinel's Reply at 4.) The case cited was decided under section 18(a) of the 1916 Act and occurred in the domestic, Puerto Rican trade.

relevant part, 26 SRR 934, 943 (1993). The scope of the Commission's jurisdiction under the 1984 Act is first determined by the Congress, which enacted that law, and in case of uncertainty regarding the meaning of the statutory language, by an appropriate United States Court of Appeals on judicial review, and, if necessary, by the United States Supreme Court. (*Id.*)[6]

For the reasons explained, I agree with Sea-Land that Elinel's claim is barred by the doctrine of res judicata, that the Court has ruled against Elinel on Elinel's equitable-estoppel defense and has only suggested that Elinel might file a complaint challenging the reasonableness of the filed rate found to be applicable by the Court. However, as explained, the Commission has no statutory jurisdiction to determine the reasonableness of the charged rate in this case, which was applied in a foreign trade of the United States. Sea-Land has also raised the affirmative defense under the "filed rate" doctrine, contending that Elinel's claim is also barred by that doctrine "as enunciated by the United States Supreme Court."

The "filed-rate" doctrine has recently been publicized as a result of the Supreme Court's decisions in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 110 S. Ct. 2759 (1990), and *Reiter v. Cooper,* 113 S. Ct. 1213 (1993), cited by the District Court. (May 10 opinion at 5-6 n. 2, and at 8.) The doctrine, which probably goes back to the previous century, is based on the courts' determination that tariffs have the force and effect of law, that shippers

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[6]Determination of the scope of the Commission's jurisdiction is made by the Courts of Appeals or the Supreme Court and not by District Courts. See, e.g., *FMC v. Seatrain Lines, Inc. et al.,* 411 U.S. 726 (1973) (Court held no FMC jurisdiction); *Austasia Intermodal Lines v. FMC,* 580 F.2d 642 (D.C. Cir. 1978) (no FMC jurisdiction); *Volkswagenwerk AG v. F.M.C.,* 390 U.S. 261 (1968) (FMC jurisdiction found); *U.S. v. American Union Transport,* 327 U.S. 437 (1946) (jurisdiction found).

are presumed to know the rates filed in the tariffs, and that those rates become the legal rates that must be charged by the carrier notwithstanding shippers' claims of errors, misquotes, misrepresentation, hardship, and the like. The Supreme Court has recognized that this strict doctrine might cause hardship in a particular case but has held that such is the price to be paid for the congressional determination that discrimination among shippers must be prevented.[7] The doctrine, however, allows for the possibility that a particular legal rate might be unlawful in some other respect and that the shipper might be able to mount a successful defense if the legal rate were found to be unreasonable under another provision of substantive law, such as the prohibition against unreasonable rates in the ICA and in the 1916 and 1933 Shipping Acts, discussed above.

The Commission has followed the filed-rate doctrine in previous cases and has compelled carriers to adhere to their filed rates regardless of misquotations, misreadings of tariffs by carriers' agents or side agreements, and the resulting burdens on shippers when the carrier refused to charge the rate that the shipper had thought would be assessed. See *Adel International Development, Inc. v. PRMSA,* 23 F.M.C. 477 (20 SRR 139, 687) (1980);

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[7] In a frequently-cited case, *Louisville & Nashville R. Co. v. Maxwell,* 237 U.S. 94, 97 (1915), the Supreme Court stated as follows:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

The above principles hold true with respect to tariffs filed with the Federal Maritime Commission under the Shipping Acts. See, e.g., *Sea-Land Service, Inc. v. Murrey & Son's Co. Inc.,* 824 F.2d 740, 743-744 (9th Cir. 1987); *Maritime Service v. Sweet Brokerage De Puerto Rico,* 537 F.2d 560, 562 (1st Cir. 1976).

see also *Farr Co. v. Seatrain Lines, Inc.*, 20 F.M.C. 411, 414, 417 n. 8(1978), for case citations under the filed-rate doctrine.[8] In *Adel,* the complaining shipper had alleged that the carrier's agent had quoted a particular rate, on which the shipper had relied, but because of the agent's misreading of the tariff, the carrier ultimately charged higher freight on the shipment and billed the shipper for $105,000 in additional freight. The shipper had also claimed that the carrier had acted with "deliberate bad faith" and that its conduct was "unconscionable." The dispute had been referred to the Commission by a District Court, before which the carrier's suit for unpaid freight was pending. Applying the filed-rate doctrine, the Commission held that the carrier had not violated shipping law and that the carrier was entitled to the additional freight.

Once the applicable filed rate has been determined, as it has been by the Court in the instant case, the filed-rate doctrine would bar the shipper from raising equitable defenses even if the shipper had relied on a carrier's agent's misquotation or mistaken interpretation of the tariff. Moreover, the Supreme Court has indicated that even if the carrier's agent had been guilty of intentional misconduct, the shipper would be required to pay the filed rate. See *Maislin,* cited above, 110 S.Ct. at 2769 n. 12; see also the discussion and cases cited in *Adel International,* cited above, 23 F.M.C. at 500 (20 SRR at 151-152),

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[8]The most recent invocation of the filed-rate doctrine before the Commission occurred in *American President Lines, Ltd. v. Cyprus Mines Corporation et al,* 26 SRR 969 (ALJ 1993). Judge Morgan found that the complainant carrier was entitled to an award of reparations for unpaid additional freight when the shipper, with the knowledge of the carrier's agent, deliberately misdescribed the cargo so as to obtain a lower rate. The shipper claimed that the carrier did not suffer actual injury because it participated in the misdescription scheme. The case is pending decision of the Commission on exceptions to Judge Morgan's decision. There is no contention or evidence in the instant case that Elinel misdescribed the cargo for illicit purposes as had the shipper in *American President Lines, Ltd.* A succinct discussion of the filed-rate doctrine with case citations can be found in 13 Corpus Juris Secundum, Carriers, sec. 470. As this authority notes with a case citation, even if the carrier had acted fraudulently, the shipper must pay the filed tariff rate.

regarding fraudulent misrepresentation as not being a valid defense. In the instant litigation, the Court has already determined what is the correct filed rate to be applied to the shipment, agreeing with Sea-Land, and has rejected Elinel's contention that "equitable estoppel" should be invoked against Sea-Land. (See May 10 opinion, cited above, at 5 n. 2.) The matters of the correct rate and Sea-Land's alleged conduct in quoting an incorrect rate prior to the shipment have been considered and decided by the District Court and are therefore precluded by the doctrine of res judicata.

Accordingly, the instant complaint is dismissed.

Norman D. Kline

Norman D. Kline
Administrative Law Judge

Washington, D.C.
January 4, 1994